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No. _____

IN THE
Supreme Court of the United States

DAVID L. SMITH,
PETITIONER,
V.
UNITED STATES OF AMERICA, COMMISSIONER OF INTERNAL REVENUE, HARRY T. MANAKA, DIANE M. PHILLIPS, AND GARY T. EASLEY,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

DAVID L. SMITH
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PRO SE ATTORNEY PETITIONER

November 4, 2009

QUESTIONS PRESENTED

Whether in dismissing Smith's appeal as a sanction for his alleged failure to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005), the Tenth Circuit has again grossly abused its inherent power to impose attorney discipline and other sanctions against Smith, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power; whether the Tenth Circuit has also arbitrarily deprived Smith of his constitutional and statutory rights to appeal and receive meaningful appellate review.

Whether the Judges of the Tenth Circuit were required to disqualify themselves from Smith's appeals in accordance with 28 U.S.C. § 455(a) and (b); whether their conduct constituted a denial of Fifth Amendment due process of law under this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).

TABLE OF CONTENTS

Questions Presented. i

Table of Authorities. iii

Opinions Below. vii

Jurisdiction. vii

Constitutional Provisions, Statutes, and Rules Involved viii

Statement of the Case. 1

Reasons for Granting the Writ. 8

A. REVIEW IS WARRANTED BECAUSE IN DISMISSING SMITH'S APPEAL AS A SANCTION FOR HIS ALLEGED FAILURE TO PAY A MONETARY SANCTION OF $6,000 IMPOSED AGAINST HIM BY THE TENTH CIRCUIT IN A PRIOR APPEAL, *SMITH V. COMMISSIONER OF INTERNAL REVENUE*, 10 F. APP'X 666 (10TH CIR. 2005), THE TENTH CIRCUIT HAS AGAIN GROSSLY ABUSED ITS INHERENT POWER TO IMPOSE ATTORNEY DISCIPLINE AND OTHER SANCTIONS AGAINST SMITH, AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER; THE TENTH CIRCUIT HAS ALSO ARBITRARILY DEPRIVED SMITH OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO APPEAL AND RECEIVE MEANINGFUL APPELLATE REVIEW. 10

B. REVIEW IS WARRANTED BECAUSE THE JUDGES OF THE TENTH CIRCUIT WERE REQUIRED TO DISQUALIFY THEMSELVES FROM SMITH'S APPEALS IN ACCORDANCE WITH 28 U.S.C. § 455(A) AND (B); THEIR CONDUCT CONSTITUTED A DENIAL OF FIFTH AMENDMENT DUE PROCESS OF LAW UNDER

THIS COURT'S DECISION IN *CAPERTON V. A.T. MASSEY COAL CO.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). 20

APPENDIX:

Smith v. United States of America,
No. 08-1418 (10th Cir. July 6, 2009) 1a

Smith v. United States of America,
No. 08-1418 (10th Cir. August 6, 2009). 5a

Smith v. Commissioner of Internal Revenue,
10 F. App'x 666 (10th Cir. 2005) 6a

TABLE OF AUTHORITIES

Cases

Caperton v. A.T. Massey Coal Co.,
129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). 20, 21

Casillan v. Regional Transportation District,
986 F.2d 1426 (10th Cir. 1993), *cert. denied*,
114 S.Ct. 2710 (1994) 8-9

Chambers v. NASCO, 501 U.S. 32,
111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). . . . 10, 11, 20

DeHerrera v. City and County of Denver,
Nos. 93-1070, 93-1139 (10th Cir. September
3, 1993). 9

DeHerrera v. City and County of Denver,
89 F.3d 849 (10th Cir. 1996). 9

Dunkin v. Louisiana-Pacific Corp.,
89 F.3d 849 (10th Cir. 1996), *cert. denied*,
117 S.Ct. 435 (1996). 9

Dunkin v. Louisiana-Pacific Corp.,
120 F.3d 270 (10th Cir. 1997), *cert. denied*,
118 S.Ct. 884 (1998). 9

Frazier v. Heebe, 482 U.S. 641,
107 S.Ct. 2607, 96 L.Ed.2d 557 (1987). 20

Howard v. Mail-Well Envelope Co.,
150 F.3d 1227 (10th Cir. 1998)
(*en banc*) (*per curiam*). 9

In re Smith, 10 F.3d 723 (10th Cir. 1993),
cert. denied, 513 U.S. 807 (1994). 9

In re Smith, 76 F.3d 335 (10th Cir. 1996) (*per curiam*), *cert. denied*, 519 U.S. 871(1996). 9

In re Smith, No. 08-822
(10th Cir. September 16, 2008). 9

In re Smith, No. 08-1323 (10th Cir.
May 12, 2009), *cert. pending, sub nom*
Smith v. United States Court of Appeals
for the Tenth Circuit, No. 09-303 (filed
August 26, 2009). 9-10

Qualls v. Regional Transportation District,
No. 05-1385 (10th Cir. July 23, 1996) 9

Roadway Express v. Piper, 447 U.S. 752,
100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). . . . 10, 11, 20

Smith v. Colorado Supreme Court,
No. 08-1030 (10th Cir. July 24, 2008) 9

Smith v. Commissioner of Internal Revenue,
10 F. App'x 666 (10th Cir. 2005) 8, 9, 10, 11, 14, 15, 16, 17, 18

Smith v. Seymour,
229 F.App'x 811 (10th Cir. 2007). 9

Statutes

26 U.S.C. § 6320(b). 2

26 U.S.C. § 6330(b). 2

26 U.S.C. § 6330(c)(2). 3

26 U.S.C. § 6330(e) 2, 4, 5

26 U.S.C. § 6330(e)(1). 7

26 U.S.C. § 6331(d). 5

26 U.S.C. § 6331(h). 6

26 U.S.C. § 7122. 6

26 U.S.C. § 7433. . . . . 1, 3

28 U.S.C. § 157. 1

28 U.S.C. § 455(a). 20, 21

28 U.S.C. § 455(b). 20, 21

28 U.S.C. § 1291. 20

28 U.S.C. § 1331. 1

28 U.S.C. § 1340. 1

28 U.S.C. § 1346(a). 1

28 U.S.C. § 1391(e). 1

28 U.S.C. § 1654. 20

28 U.S.C. § 2072. 20

Other Authorities

U.S. CONST. amend. I. 20

U.S. CONST. amend. V. 1, 2, 20, 21

10th Cir. R. 27.2(A)(1)(a). 11

10th Cir. R. 27.2(A)(3)(a). 11

OPINIONS BELOW

On July 6, 2009, a three-judge Panel of the United States Court of Appeals for the Tenth Circuit entered its Order and Judgment dismissing Smith's appeal as a sanction for his alleged failure to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005). The Tenth Circuit Panel's Order denying Smith's Joint Petition for Panel Rehearing and Petition for Rehearing *En Banc* was entered on August 6, 2009. These orders or opinions are included in the Appendix attached to this Petition, at 1a-14a.

JURISDICTION

Jurisdiction in the Tenth Circuit was based on 28 U.S.C. § 1291. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the Tenth Circuit's decision is 28 U.S.C. § 1254(1), providing that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

Jurisdiction in this Court is also based on 28 U.S.C. § 2072, providing that "[t}he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts

and courts of appeals of the United States in civil actions . . . . " In dismissing Smith's appeal as a sanction for his alleged failure to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005), the Tenth Circuit has again grossly abused its inherent power to impose attorney discipline and other sanctions against Smith, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See Chambers v. NASCO,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), citing *Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); 28 U.S.C. § 2072; *Frazier v. Heebe,* 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987). The Tenth Circuit has also deprived Smith of his constitutional and statutory rights to appeal and receive meaningful appellate review. U.S. CONST. amend. I; U.S. CONST. amend. V; 28 U.S.C. §§ 1291, 1654 and 2072. The Judges of the Tenth Circuit were required to disqualify themselves from Smith's appeals in accordance with 28 U.S.C. § 455(a) and (b). Their conduct constituted a denial of Fifth Amendment due process of law under this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the . . .

right of the people . . . to petition the government for a redress of grievances." U.S. CONST. amend. I.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend V.

28 U.S.C. § 455 provides, in pertinent part, that "(a) [a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and "(b) [h]e shall also disqualify himself in the following circumstances: (1) [w]here he has a personal bias or prejudice concerning a party . . . ."

28 U.S.C. § 1291 provides, in pertinent part, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

28 U.S.C. § 1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

28 U.S.C. § 2072 provides, in pertinent part, that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . . "

Pursuant to this Court's Rule 10, 12, 13 and 14, Pro Se Attorney Petitioner David L. Smith ("Smith") respectfully submits his Petition for a Writ of Certiorari. In support thereof, Smith alleges as follows:

STATEMENT OF THE CASE

This case was originally filed (on August 31, 2006) as an Adversary Proceeding in the United States Bankruptcy Court for the District of Colorado. In his Complaint and Jury Demand, Smith alleged claims for relief under 26 U.S.C. § 7433 and the Fifth Amendment to the Constitution of the United States:

> COME NOW the plaintiffs, M. Julia Hook and David L. Smith, and file their Complaint and Jury Demand against the above-named defendants, and allege as follows:
>
> 1. This is a suit for damages and other legal and equitable relief under 26 U.S.C. § 7433 and the Fifth Amendment to the Constitution of the United States. Jurisdiction is based on 26 U.S.C. § 7433 and 28 U.S.C. §§ 1331, 1340, and 1346(a). Venue is proper under 28 U.S.C. § 1391(e). Reference is made to the above case caption for the name, number and chapter of the case under the Bankruptcy Code to which the adversary proceeding relates and to the district where the case is pending. This is a non-core proceeding under the Bankruptcy Code and 28 U.S.C. § 157. Plaintiffs do not

consent to the entry of a final order or judgment by the Bankruptcy Judge.

2. On March 10, 2006, plaintiffs served a Request for a Collection Due Process Hearing on the Commissioner of Internal Revenue alleging as follows:

> This is the third time the taxpayers have requested a Collection Due Process Hearing to protest the filing of liens and/or levies on their property. (Copies of the previous requests are attached to this attachment.) While no Collection Due Process Hearing has been held by the Internal Revenue Service Office of Appeals, Internal Revenue Service Officer Diane M. Phillips and Western Area Director Harry T. Manaka have caused numerous liens and levies to be placed on the property or the right to property of the taxpayers, in violation of 26 U.S.C. §§ 6320(b) and 6330(b), and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. These lien and levy actions were effected during the period of suspension of lien and levy actions under 26 U.S.C. § 6330(e). As the proximate result of these reckless, intentional, and/or negligent statutory and/or constitutional violations by the Internal Revenue Officer and the

> Western Area Director, the taxpayers have sustained continuing actual, direct economic damages, for which they seek full compensation from the United States. *See* 26 U.S.C. § 7433. The taxpayers request a Collection Due Process Hearing with the Internal Revenue Service Office of Appeals on the foregoing issues, as well as those enumerated in 26 U.S.C. § 6330(c)(2), including challenges to the appropriateness of collection actions; offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise; and/or challenges to the existence or amount of the underlying tax liability for any tax year period if the taxpayers did not have an opportunity to dispute such tax liability.

In a cover letter, plaintiff Smith alleged that the Internal Revenue Officer is still refusing to comply with the February 6, 2006 collection decision by the Team Manager of the Internal Revenue Service Office of Appeals, Gary T. Easley, requiring release of the levy which attaches to approximately $16,964.00 in a Merrill Lynch Account, and requesting a release of this levy without further delay.

3. On March 28, 2006, no response having been made to plaintiffs' requests, plaintiff Smith wrote the following letter to the Internal Revenue Officer and the Team Manager Appeals:

> On March 10, 2006, I served (via hand delivery and certified mail) on each of you a Request for a Collection Due Process Hearing, as well as a letter requesting that all lien and levy actions which are the subject of the requested hearing be suspended for the period during which such hearing, and appeals therein, are pending, as required by 26 U.S.C. § 6330(e). You have not yet notified me whether you intend to comply with my requests.
>
> Unless I hear from you on these requests by Friday, March 31, 2006, at 5:00 p.m., I will have no choice but to pursue my remedies in the United States Tax Court and/or the United States District Court. Please respond, in writing, at the letterhead address or fax number ASAP.
>
> I am attaching a copy of an appeal recently filed in the Office of Collections, Internal Revenue Service in connection with IRS Agent Diane Phillip's role in the payment to the IRS by a law firm with which

Taxpayer Mary Julia Hook has a relationship (Fognani & Faught, PLLC) of an amount in excess of $36,500.00 that was Ms. Hook's share of her own client's payment for her legal work done over a ten-month period as an independent contractor (not an employee) of the law firm. The payment to the IRS was made by the law firm pursuant to a continuing levy that was served on the firm on or about August 16, 2005, and the payment was made only after the office manager was told by IRS Agent Phillips that the firm was required to make the payment despite Ms. Hook's independent contractor status.

4. In addition to the amounts mentioned in paragraphs 2 and 3 above, approximately $39,000 was wrongfully turned over to the IRS by Interactive Brokers LLC under Notice of Levy dated 08/12/2005; approximately $200 was wrongfully turned over to the IRS by Fognani & Faught, PLLC under Notice of Levy on Wages, Salary, and Other Income dated 08/12/2005 and 08/16/2005; and approximately $65,000 was wrongfully turned over to the IRS under letter dated 09/2005. No notice was given before levy, as required by 26 U.S.C. § 6331(d). Levy was made during the period of suspension of levy actions under 26 U.S.C. § 6330(e).

5. Plaintiffs have not had a full and fair opportunity, or any opportunity, to challenge or litigate the existence or amount (in excess of $500,000) of the underlying tax liability upon which defendants' unlawful liens and levies were based. The United States Tax Court entered a default judgment against plaintiffs as a sanction for their alleged failure to properly prosecute their tax cases without holding a due process hearing. This default judgment was based on false and defamatory charges made by the Commissioner of Internal Revenue and its attorneys, who thus committed a fraud on the Tax Court and the plaintiffs.

6. On March 29, 2006, plaintiff Hook filed her offer-in-compromise with the Commissioner of Internal Revenue under 26 U.S.C. § 7122. Therefore, under 26 U.S.C. § 6331(h), no levy may be made on the property or rights to property of plaintiff Hook during the period that her offer-in-compromise is pending, including her currently pending appeal of the determination by the IRS that she had filed her offer-in-compromise solely for the purpose of delay. Despite this stay, the IRS has made numerous threats to seize or sell Hook's property in violation of the stay.

7. As the result of defendants' unlawful actions, plaintiffs have been deprived of the cash and capital from which to fund their

law practices, plaintiff Hook's rental properties, and plaintiff Smith's securities trading activities, and from which to pay bills and expenses, including significant monthly mortgage amounts. Because of the cash flow problem, the bank has instituted foreclosure proceedings on plaintiff Hook's home and rental properties. Plaintiff Hook has been unable to secure re-financing of her mortgages because of defendants' unlawful liens and levies and the resulting damage to her credit. Plaintiffs have been forced to file for Chapter 11 bankruptcy.

WHEREFORE, plaintiffs request all actual, direct economic damages sustained as the proximate result of defendants' violation of plaintiffs' statutory and constitutional rights, in an amount to be proved to the jury at trial; mental or emotional distress damages; exemplary or punitive damages against defendants Harry T. Manaka, Diane M. Phillips, and Gary T. Easley in their individual capacities; an order declaring null and void *ab initio* the default judgment entered by the United States Tax Court against the plaintiffs; an order requiring the Commissioner of Internal Revenue to return to plaintiffs all money and other property (or right to property) subjected to levy or lien actions during the time the suspension under 26 U.S.C. § 6330(e)(1) was in force; pre- and post-judgment interest, costs and attorney fees (including expert witness fees); and such

other and further legal and equitable relief as may be just under the circumstances, including preliminary and permanent injunctive relief.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

On April 19, 2007, the Bankruptcy Judge dismissed Smith's Complaint for "lack of subject matter jurisdiction," and appeal was taken to the United States District Court for the District of Colorado, which affirmed the Bankruptcy Judge's dismissal of Smith's Complaint "in all respects." Appeal was then taken to the United States Court of Appeals for the Tenth Circuit, which dismissed (on July 6, 2009) the appeal as a sanction for Smith's alleged failure to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005). The Tenth Circuit Panel's Order denying Smith's Joint Petition for Panel Rehearing and Petition for Rehearing *En Banc* was entered on August 6, 2009.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has a long history of imposing harsh and unjustified attorney discipline and other sanctions against Smith without due process of law. *See, e.g., Casillan v. Regional Transportation*

District, 986 F.2d 1426 (10th Cir. 1993) (monetary sanctions after case dismissal), *cert. denied*, 114 S.Ct. 2710 (1994); *DeHerrera v. City and County of Denver*, Nos. 93-1070, 93-1139 (10th Cir. September 3, 1993) (monetary sanctions and referral to the Tenth Circuit's attorney disciplinary panel for further proceedings); *In re Smith*, 10 F.3d 723 (10th Cir. 1993) (indefinite suspension from practice), *cert. denied*, 513 U.S. 807 (1994); *In re Smith*, 76 F.3d 335 (10th Cir. 1996) (*per curiam*) (disbarment), *cert. denied*, 519 U.S. 871 (1996); *DeHerrera v. City and County of Denver*, 89 F.3d 849 (10th Cir. 1996) (monetary sanctions and refusal to vacate same after case settlement); *Dunkin v. Louisiana-Pacific Corp.*, 89 F.3d 849 (10th Cir. 1996) (monetary sanctions), *cert. denied*, 117 S.Ct. 435 (1996); *Qualls v. Regional Transportation District*, No. 05-1385 (10th Cir. July 23, 1996) (monetary sanctions); *Dunkin v. Louisiana-Pacific Corp.*, 120 F.3d 270 (10th Cir. 1997) (refusal to vacate monetary sanctions after case settlement), *cert. denied*, 118 S.Ct. 884 (1998); *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998) (*en banc*) (*per curiam*) (prospective filing restrictions after case dismissal). More recently, *see Smith v. Commissioner of Internal Revenue*, 10 F.App'x 666 (10th Cir. 2005) (monetary sanctions after case dismissal); *Smith v. Seymour*, 229 F.App'x 811 (10th Cir. 2007) (case dismissal); *Smith v. Colorado Supreme Court*, No. 08-1030 (10th Cir. July 24, 2008) (case dismissal); *In re Smith*, No. 08-822 (10th Cir. September 16, 2008) (admonition); *In re Smith*, No. 08-1323 (10th Cir. May 12, 2009) (refusal to readmit or reinstate Smith to the Bar of the United States District Court for the District of Colorado), *cert.*

pending, sub nom Smith v. United States Court of Appeals for the Tenth Circuit, No. 09-303 (filed August 26, 2009). In these cases, the Tenth Circuit grossly abused its inherent power to impose attorney discipline and other sanctions against Smith. *See Chambers v. NASCO,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), citing *Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

A. REVIEW IS WARRANTED BECAUSE IN DISMISSING SMITH'S APPEAL AS A SANCTION FOR HIS ALLEGED FAILURE TO PAY A MONETARY SANCTION OF $6,000 IMPOSED AGAINST HIM BY THE TENTH CIRCUIT IN A PRIOR APPEAL, *SMITH V. COMMISSIONER OF INTERNAL REVENUE,* 10 F. APP'X 666 (10TH CIR. 2005), THE TENTH CIRCUIT HAS AGAIN GROSSLY ABUSED ITS INHERENT POWER TO IMPOSE ATTORNEY DISCIPLINE AND OTHER SANCTIONS AGAINST SMITH, AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER; THE TENTH CIRCUIT HAS ALSO ARBITRARILY DEPRIVED SMITH OF HIS CONSTITUTIONAL AND STATUTORY RIGHT TO APPEAL AND RECEIVE MEANINGFUL APPELLATE REVIEW.

In the absence of a finding that Smith acted in bad faith, the Tenth Circuit has again grossly abused its inherent power to impose the sanction of case dismissal against Smith for his alleged failure

to pay a monetary sanction of $6,000 imposed against him by the Tenth Circuit in a prior appeal, *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005). *See Chambers v. NASCO,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), citing *Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

On March 9, 2009, Smith filed his Response in Opposition to Motion to Dismiss This Appeal and Request for Oral Argument. Smith stated that in addition to their failure to comply with 10th Cir. R. 27.2(A)(3)(a), providing that "[a] motion [to dismiss] under (A)(1)(a) . . . should be filed within 15 days after the notice of appeal is filed, unless good cause is shown," the Commissioner of Internal Revenue and other Defendants-Appellees failed to demonstrate that Smith failed to pay or otherwise satisfy the referenced monetary sanction. In their Motion to Dismiss, Defendants-Appellees' attorneys asserted that "[t]his office [Tax Division, Department of Justice] has no record that any portion of this previously-imposed sanction has been paid." However, this previously-imposed sanction was listed on the schedules filed in Smith's and his wife's Chapter 11 bankruptcy cases (Nos. 06-15511 and 08-11271) as disputed claims against the estates. Defendants-Appellees failed to file proofs of claim or otherwise pursue their claims against Smith and/or his wife in the Bankruptcy Court. Furthermore, Defendants-Appellees' unlawful liens and levies on Smith's property have prevented Smith from being able to pay this previously-imposed sanction. These

unlawful liens and levies are described in Smith's Complaint and Jury Demand filed in the Bankruptcy Court in Adversary Proceeding No. 06-01762. Finally, Defendants-Appellees continue to levy on 100% of Smith's only income of $500+ per month in Social Security benefits, despite repeated promises by Internal Revenue Service Attorney Joan E. Steele that Defendants-Appellees' unlawful levy on amounts beyond the statutory limit would be lifted. These promises were made by IRS Attorney Steele during hearings in Smith's wife's Chapter 11 bankruptcy case (No. 08-11271).

In its July 6, 2009 Order and Judgment, the Tenth Circuit Panel found and concluded that based on the assertion made by Defendants-Appellees' attorneys, Smith failed to pay the previously imposed sanction, and dismissed his appeal as a sanction for his failure to pay. No finding was made as to whether Smith acted in bad faith.

On July 17, 2009, Smith filed his Joint Petition for Panel Rehearing and Petition for Rehearing *En Banc*. In support thereof, Smith submitted M. Julia Hook's Declaration Under Penalty of Perjury:

> 1. My name is M. Julia Hook, also known as Julia Hook and Mary Julia Hook. I am over the age of eighteen years, and am otherwise competent to make this Declaration.
>
> 2. I have been an attorney for nearly 37 years, and am licensed to practice law in the

States of Colorado and Texas as well as in a number of federal courts, including the United States Court of Appeals for the Tenth Circuit.

3. I have been married to David L. Smith, also know as David Lee Smith, since December of 1972; and although we have been separated and living apart for approximately 10 years, I am generally familiar with his financial situation and I have personal knowledge of all of the facts contained within this Declaration.

4. David L. Smith's sole independent source of income is his monthly social security check in the amount of approximately $500. The Commissioner of Internal Revenue/Internal Revenue Service has levied on Mr. Smith's social security and has been taking 100% of this amount since at least December of 2007. Mr. Smith owns no assets other than his clothes, books, a 40-year old car and similar personal effects of limited economic value. Mr. Smith and I have never divorced; and I am aware that if we were to do so, under Colorado law he would more likely than not be entitled to a significant portion of my assets and income in the form of spousal support. In addition, although we are separated, I am aware that under Colorado law I have obligations for his financial support. In fulfillment of that obligation, I currently provide him a place to

live in a condominium unit that I own, and cover the expense of his other basic necessities of life.

5. In 2005, this Court imposed a monetary sanction of $6,000 against Mr. Smith and me in *Smith v. Commissioner of Internal Revenue,* 10 F. App'x 666 (10th Cir. 2005). This case was an appeal from default judgments entered by the Tax Court against Mr. Smith and me for taxes, penalties and interest relating to five tax years in the 1990s. I represented Mr. Smith in his appeal. The sanction was payable to the United States Department of Justice and/or the Commissioner of Internal Revenue/Internal Revenue Service.

6. When the $6000 sanction against Mr. Smith and me was imposed by this Court in 2005, Mr. Smith was without assets or funds of any sort to pay it. Before I was able to pay the sanction out of my assets and income, the Commissioner of Internal Revenue/Internal Revenue Service levied on my bank and brokerage accounts and garnished the funds I had earned in the hands of the law firm with which I am affiliated (as well as all funds I would earn by virtue of the affiliation in the future), leaving me without funds with which to pay the sanction. The levies and garnishments, which were filed for the five tax years in the 1990s that were the subject of Mr. Smith's appeal, also meant I could not

make mortgage payments on three real properties that I own; and as a result, foreclosure proceedings were started with respect to those properties.

7. As a result of the levies and garnishments filed by the Commissioner of Internal Revenue/Internal Revenue Service against me and their impact on my assets (including real properties) and income, Mr. Smith and I were forced to file for Chapter 11 bankruptcy in August of 2006 (Case No. 06-15511).

8. The $6000 sanction imposed by this Court in *Smith v. Commissioner of Internal Revenue, supra* was listed as a disputed claim in Case No. 06-15511. Neither the Commissioner of Internal Revenue/Internal Revenue Service nor the United States Department of Justice filed a proof of claim or otherwise pursued their claim for the $6000 sanction against Mr. Smith and/or me in Case No 06-15511, although they were given appropriate notice of the bankruptcy filing.

9. Bankruptcy Case No. 06-15511 was dismissed in September of 2007 on the motion of the Commissioner of Internal Revenue/Internal Revenue Service.

10. In February of 2008, I filed a Chapter 11 bankruptcy case on my own behalf (Case

No. 08-11271), listing the entire $6000 sanction imposed in *Smith v. Commissioner of Internal Revenue, supra* as a disputed claim against me in my sole and separate capacity. Once again the Commissioner of Internal Revenue/Internal Revenue Service and the United States Department of Justice failed to file a proof of claim or otherwise pursue their claim for the $6000 sanction against me, although they were given appropriate notice of the bankruptcy filing.

11. The Commissioner of Internal Revenue/Internal Revenue Service, represented by Internal Revenue Service Attorney Joan E. Steele (who also identified herself in pleadings as a special attorney in the United States Department of Justice/United States Attorney's Office) did file a proof of claim in Case No. 08-11271 for amounts resulting from the default judgments imposed against Mr. Smith and me by the Tax Court for taxes, penalties and interest relating to the five years in the 1990s that were the subject of Mr. Smith's appeal in *Smith v. Commissioner of Internal Revenue, supra.*

12. Although a separate proof of claim was not filed in my bankruptcy case for the $6000 sanction imposed by this Court against Mr. Smith and me in *Smith v. Commissioner of Internal Revenue, supra,* I believe it is likely that the amount claimed

by Attorney Steele on her clients' behalf includes that sanction. Despite Attorney Steele's repeated representations to my bankruptcy attorney and me that she would go over the total amount in her clients' proof of claim with us and articulate the basis for each amount listed, to date she has failed to do so.

13. A plan of reorganization and disclosure statement in my bankruptcy case was approved by Judge Sidney B. Brooks in December of 2008, with the consent of Attorney Steele on behalf of her clients. Under my plan of reorganization, I have assumed responsibility for paying 100% of the amount relating to the five years in the 1990s claimed by Attorney Steele on her clients' behalf -- an amount that I believe may well include the $6000 sanction imposed by this Court in *Smith v. Commissioner of Internal Revenue, supra* (Mr. Smith's appeal of the default judgments entered by the Tax Court against us for those years).

14. Despite the fact that the Commissioner of Internal Revenue/Internal Revenue Service has levied on Mr. Smith's sole independent source of income and has been taking 100% of his monthly social security in the amount of approximately $500 since at least December of 2007, I do not believe any of that money has been applied to reduce the debt relating to the five

tax years in the 1990s that I am paying to the Commissioner of Internal Revenue/Internal Revenue Service under my approved plan of reorganization. I can only assume that the $10,000 taken from Mr. Smith has been applied to the $6000 sanction imposed in *Smith v. Commissioner of Internal Revenue, supra*; although it is also likely that I am paying the same $6000 sanction under my plan of reorganization.

15. In approximately March of 2008, during a hearing in my bankruptcy case, Attorney Steele -- on her clients' behalf -- acknowledged that it would be improper for her clients to levy on and take 100% of Mr. Smith's social security payments; and she represented to the bankruptcy court that she would ensure that the situation was promptly rectified. To date, however, she has failed to do so despite repeated inquiries by my bankruptcy attorney; and the Commissioner of Internal Revenue/Internal Revenue Service continues to take 100% of Mr. Smith's only independent source of income.

16. If the approximately $10,000 taken from Mr. Smith by the Commissioner of Internal Revenue/Internal Revenue Service since December of 2007 has not been applied to the $6000 sanction and it remains unpaid by Mr. Smith, I know that he cannot pay the sanction as he is without any resources with

which to pay it. My income is committed to being expended (and is being expended) in accordance with the approved plan of reorganization in my Chapter 11 bankruptcy case – a plan that includes monthly and quarterly payments that may also cover the $6000 sanction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of July, 2009.

Ms. Hook's Declaration Under Penalty of Perjury further demonstrated that Smith did not fail to pay or otherwise satisfy the monetary sanction of $6,000 imposed against him by the Tenth Circuit in the prior appeal, and that he did not act in bad faith.

In its August 6, 2009 Order, the Tenth Circuit Panel said:

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

By completely ignoring Ms. Hook's Declaration Under Penalty of Perjury, and failing or refusing to

make a finding as to whether Smith acted in bad faith, the Tenth Circuit has again grossly abused its inherent power to impose attorney discipline and other sanctions against Smith, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See Chambers v. NASCO,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), citing *Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); 28 U.S.C. § 2072; *Frazier v. Heebe,* 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987). The Tenth Circuit has also deprived Smith of his constitutional and statutory rights to appeal and receive meaningful appellate review. U.S. CONST. amend. I; U.S. CONST. amend. V; 28 U.S.C. §§ 1291, 1654 and 2072.

B. REVIEW IS WARRANTED BECAUSE THE JUDGES OF THE TENTH CIRCUIT WERE REQUIRED TO DISQUALIFY THEMSELVES FROM SMITH'S APPEALS IN ACCORDANCE WITH 28 U.S.C. § 455(A) AND (B); THEIR CONDUCT CONSTITUTED A DENIAL OF FIFTH AMENDMENT DUE PROCESS OF LAW UNDER THIS COURT'S DECISION IN *CAPERTON V. A.T. MASSEY COAL CO.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).

Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and, under § 455(b), "[h]e shall also disqualify himself . . .

(1) [w]here he has a personal bias or prejudice concerning a party . . . ." The impartiality of the Judges of the Tenth Circuit might reasonably be questioned based on their long history of imposing harsh and unjustified attorney discipline and other sanctions against Smith without due process of law. Obviously, the Judges of the Tenth Circuit have a personal bias or prejudice against Smith. For these reasons, the Judges of the Tenth Circuit were required to disqualify themselves from Smith's appeals in accordance with 28 U.S.C. § 455(a) and (b). Their conduct constituted a denial of Fifth Amendment due process of law under this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable where a judge had no pecuniary interest in the case but had determined in an earlier proceeding whether criminal charges should be brought and then proceeded to try and convict the petitioner).

Respectfully submitted,

/s/David L. Smith

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PRO SE ATTORNEY PETITIONER

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; COMMISSIONER OF INTERNAL REVENUE; HARRY T. MANAKA; DIANE M. PHILLIPS; GARY T. EASLEY,

Defendants-Appellees.

Filed July 6, 2009

No. 08-1418
(D.C. No.1:07-CV-00876-BSJ)
(D. Colo.)

ORDER AND JUDGMENT[1]

Before **BRISCOE, MCKAY,** and **ANDERSON,** Circuit Judges.

David Lee Smith, an attorney who frequently and unsuccessfully litigates on his own behalf, challenges the dismissal of his adversary proceeding against the United States, the Internal Revenue

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[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Service (IRS), and individual IRS employees.[2] We dismiss the matter for Mr. Smith's failure to pay the sanctions we imposed in *Smith v. C.I.R.*, 160 F. App'x 666, 670 (10th Cir. 2005).

Mr. Smith and M. Julia Hook (Mr. Smith's wife) filed an adversary proceeding in their Chapter 11 bankruptcy case asserting wrongful assessment and collection of their federal income taxes. In their complaint, they sought a declaratory judgment, injunctive relief, economic damages, and punitive damages. For numerous reasons, the bankruptcy court dismissed each of their claims and the district court affirmed. Mr. Smith has appealed.[3]

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[2]In this court alone, Mr. Smith's cases include: *In re Smith*, No. 08-1323, 2009 WL 1303165 (10th Cir. May 12, 2009) (affirming denial of reinstatement to the bar of the United States District Court for the District of Colorado); *In re Smith*, 287 F. App'x 683, 684 (10th Cir. 2008) (affirming dismissal of bankruptcy adversary proceeding seeking restoration of privileges as a licensed Colorado attorney); *Smith v. Seymour*, 229 F. App'x 811, 812 (10th Cir. 2007) (affirming dismissal of complaint against judges of this court, the clerk of this court, other courts involved in disciplinary decisions, a justice of the Colorado Supreme Court, and his attorney in disciplinary proceedings); *Smith v. C.I.R.*, 160 F. App'x 666, 668-70 (10th Cir. 2005) (affirming United States Tax Court' denial of his motions for leave to file motions to vacate or revise and imposing monetary sanctions); *Smith v. Figa & Burns*, 69 F. App'x 922, 926 (10th Cir. 2003) (dismissing appeal filed by Smith's wife concerning his malpractice claims and affirming district court's judgment on the couple's remaining claims); *Marks v. U.S. West Direct*, No. 98-1043, 1998 WL 856139, *1 (10th Cir. Dec. 11, 1998) (dismissing Smith's nonparty appeal for lack of standing); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (suspending Mr. Smith "from the practice of law before this court until all sanctions are paid").

This court, however, previously imposed sanctions for Mr. Smith's "blatant waste of judicial time and resources" in pursuing a frivolous appeal. *Id.* We ordered Mr. Smith to pay $6,000 to the Commissioner of Internal Revenue for costs incurred in defending against a frivolous appeal. *Id.*[4] The brief filed in this case by the Tax Division, Department of Justice, states that its records do not reflect payment of this amount. Mr. Smith does not contend otherwise. Rather, he asserts that he listed the sanction amount in his bankruptcy case as a disputed claim, but the Commissioner failed to pursue the claim. He also argues that tax collection procedures have interfered with his ability to pay the sanction.

Mr. Smith's underlying Chapter 11 bankruptcy case was dismissed in August 2008 for failure to file an acceptable plan within a reasonable time. *Smith v. Colo. Dep't of Revenue (In re Hook),* BAP No. CO-07-106 (B.A.P. 10 Cir. Aug. 26, 2008) (unpublished). By statute, dismissal of a bankruptcy case returns the interests of a debtor and his creditors to their status before filing the case. *See* 11 U.S.C. § 349(b)(3) (dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title"). Mr. Smith's listing of the sanction amount in his bankruptcy proceeding

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[3]Ms. Hook is not a party to this appeal. After her motion to dismiss the appeal was granted, the case has proceeded with Mr. Smith as the sole appellant.

[4]Mr. Smith and Ms. Hook were found jointly and severally liable for payment of the sanctions. *Smith,* 160 F. App'x at 670.

ceased to have any legal effect after the Bankruptcy Appellate Panel affirmed the dismissal. Moreover, we are not persuaded that financial difficulties arising from the government's tax-collection efforts excuse his nonpayment.

"Courts have inherent power to dismiss actions for nonpayment of costs in prior actions. This power also extends to a litigant's failure to pay previously imposed sanctions." *Hymes v. United States,* 993 F.2d 701, 702 (9th Cir. 1993), *on reconsideration,* No. 91-35888, 1993 WL 259483 (9th Cir. 1993) (citations omitted). As the Second Circuit has explained, sanctions act as "a warning to a vexatious litigant (and others contemplating frivolous appeals) that the processes of a court may not be abused with impunity in the future." *Schiff v. Simon & Schuster, Inc.,* 766 F.2d 61, 62 (2d cir. 1985) (*per curiam*). "To make the sanction effective and thereby protect the processes of a court from abuse, a litigant against whom . . . sanctions have been imposed must comply with those sanctions before being permitted to pursue new matters in that court." *Id.; see also Mann v. Boatright,* 477 F.3d 1140, 1150 (10th Cir. 2007) (precluding litigant from pursuing additional appeals until providing proof of compliance with previously imposed sanctions).

Because Mr. Smith has not complied with our order requiring him to pay $6,000 to the Commissioner, we DISMISS this appeal.

Entered for the Court

Monroe G. McKay
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; COMMISSIONER OF INTERNAL REVENUE; HARRY T. MANAKA; DIANE M. PHILLIPS; GARY T. EASLEY,

Defendants-Appellees.

Filed August 6, 2009

No. 08-1418

ORDER

Before **BRISCOE, MCKAY,** and **ANDERSON,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER,
Clerk

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID LEE SMITH, Filed December 6, 2005

Petitioner-Appellant,

v. Nos. 04-9009 & 04-9010

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

The opinion of the court was delivered by: John C. Porfilio Circuit Judge

ORDER AND JUDGMENT[5]

Before **LUCERO, PORFILIO,** and **ANDERSON,** Circuit Judges.

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[5]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In these appeals, David Lee Smith asserts that the United States Tax Court erred in denying his motions for leave to file motions to vacate or revise that court's earlier decisions. We affirm, and we deny Smith's motions for recusal of this court and his motion for attorney fees. We grant the government's motion for sanctions.

Motions to Recuse

First, we address Mr. Smith's motion and supplemental motion for recusal and disqualification of the entire United States Court of Appeals for the Tenth Circuit. Federal judges have a "duty to sit" on cases filed with the court." *Switzer .v Berry,* 198 F.3d 1255, 1257 (10th Cir. 2000). Recusal of a judge is not "mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *Id.* at 1258 (quotations omitted). In *Switzer,* we applied these principles and held that " a lawsuit brought indiscriminately against all active and senior judges on the Tenth Circuit Court of Appeals does not operate automatically to render the court unable to hear and decide an appeal brought by the plaintiff/petitioner." *Id.*

Mr. Smith, an attorney, has a lengthy history with this court. Due to his pattern of abusive pro se litigation, the Tenth Circuit has enjoined his "proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in this court, unless he first obtains permission to proceed pro se." *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1232 (10th Cir. 1998). There is no restriction on Mr. Smith's proceeding as a represented litigant in this court.

Also, Mr. Smith has been disbarred from the practice of law in the Tenth Circuit for violating a prior suspension order and for practicing without authorization. *In re Smith*, 76 F.3d 335, 336 (10th Cir. 1996); *see also In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (suspending Mr. Smith from practicing law in the Tenth Circuit). According to Mr. Smith, the United States Court of Appeals for the Fifth Circuit, the United States District Court for the District of Colorado, the United States District Court for the Northern District of Texas, and the Colorado Supreme Court have also suspended or disbarred him, based on the Tenth Circuit's rulings. Supp'l Mot. At 2-3.

Mr. Smith has filed a complaint in the district court pursuant to 42 U.S.C. § 1983, naming as defendants eleven active and senior judges of the United States Court of Appeals for the Tenth and Fifth Circuits, the Clerk of the Court for the Tenth Circuit Court of Appeals, several judges of the United States District Courts of Colorado and the

Northern District of Texas, a Colorado attorney, and the Chief Justice of the Colorado Supreme Court. The district court dismissed the action and Mr. Smith filed an appeal. That appeal, *Smith v. Seymour,* No. 05-1032 (10th Cir., filed Jan. 1, 2005), is pending in this court. No member of this panel is named as a defendant/appellee in Mr. Smith's current appeal.

Mr. Smith assumes, but does not show, prejudice or even a fact from which the appearance of prejudice might arise. Neither this court's enforcement of sanctions against him nor his action against other judges disqualifies this panel from hearing and resolving this appeal. Mr. Smith's motions are denied.

Tax Court's Dismissal of Motions to Vacate or Revise Decision

In the summer of 2000, Mr. Smith and his spouse, Mary Julia Hook, who is also an attorney, filed a petition with the United States Tax Court seeking a redetermination of assessed deficiencies in their federal income tax liabilities for 1992, 1993, and 1994 (Case I). Two years later, Mr. Smith and Ms. Hook filed another petition seeking a redetermination of deficiencies for 1995 and 1996 (Case II). This court has described the Tax Court litigation:

Case I was originally set for trial on September 10, 2001, but was continued, at Taxpayers' request, after a hearing. Following four days of trial between

May 2, 2002, and August 19, 2002, several additional continuances at [T]axpayers' request and the consolidation of the first case with the more recently filed second case. Taxpayers failed to appear at the resumption of the trial scheduled for May 19, 2003. Taxpayers had filed an emergency motion to strike and reset the trial date on May 16, 2003. Taxpayers neglected to notify their ten witnesses under subpoena who did appear at the trial setting along with one witness on behalf of the Commissioner. Ms. Hook claims that she and her husband missed the trial setting because "they were both very, very sick." After permitting the taxpayers to show cause, the tax court then dismissed the consolidated cases for failure to properly prosecute, and entered a decision in the amounts requested by the Commissioner for each year.

Hook v. Comm'r, 103 Fed. App'x. 661, 662-63 (10th Cir. July 13, 2004) (unpublished) (citations omitted).

Ms. Hook, but not Mr. Smith, appealed the dismissal. In the course of resolving the appeal, this court observed that "[n]o court, including the tax court, is required to tolerate conduct that disrupts the orderly administration of justice and hinders the court's management of its docket." *Id.* at 663. We concluded that the Tax Court did not abuse its discretion in dismissing the cases for failure to prosecute. *Id.* at 664.

After this court affirmed the judgment against Ms. Hook on appeal, Mr. Smith filed motions in the two Tax Court cases for leave to vacate or revise its

decisions with regard to his interests. The Tax Court promptly denied the motions by imprint stamp, without comment. Mr. Smith, who is being represented by Ms. Hook in this court, then filed a notice of appeal from the denial of his motion in each of the case. The appeals have been consolidated for procedural purposes only.

A Tax Court decision normally becomes final ninety days after entry if no party files a notice of appeal. *See* 26 U.S.C. §§ 7481(a)(1), 7483. And, "as a general rule, the Tax Court lacks jurisdiction to vacate a decision once it becomes final." *Davenport Recycling Assocs. V. Comm'r*, 220 F.3d 1255, 1259 (11th Cir. 2000) (collecting cases). Our sister circuits, however, have recognized an exception to the rule in instances of fraud on the court. *Id.*; *see also Drobny v. Comm'r*, 113 F.3d 670, 677 (7th Cir. 1997) (allowing a narrow exception to the rule of finality "if the party seeking to vacate the decision could convincingly establish that the decision resulted from a fraud on the court") (quotation omitted); *Billingsley v. Comm'r*, 868 F.2d 1081, 1085 (9th Cir. 1989) (acknowledging Tax Court jurisdiction to entertain a motion to vacate at any time if the decision was obtained by fraud on the court).

In the Tax Court, Mr. Smith alleged that the dismissal orders were based on "false and defamatory" charges, which "constituted a fraud on petitioners and the Court." R., Vo. I, Doc. 32-A at 2 (Case II); *id.* at vol. VI, Doc. 90-A at 2 (Case I). Accordingly, we conclude that the Tax Court had jurisdiction to deny the motions to vacate.

We therefore proceed to the only substantive issue in this case: whether these rulings amounted to an abuse of discretion. *See Davenport Recycling Assocs.*, 220 F.3d at 1258 (collecting cases applying the abuse-of-discretion standard to the Tax Court's denial of leave to file a motion to vacate). The "high" standard for abuse of discretion requires a showing of "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Schrier v. Univ. of Colo.*, No. 03-1275, 2005 WL 2902586, at *3 (10th Cir. Oct. 31, 2005) (quotation omitted). Based on the record before us, we discern absolutely no abuse of discretion in the denial of Mr. Smith's motions to vacate.

Motions for Sanctions

The Commissioner has moved for an order requiring Mr. Smith and Ms. Hook to pay sanctions in the amount of $6,000 for bringing and maintaining a groundless appeal. Mr. Smith has opposed the motion and countered with a request for sanctions against the government for $2,880 in attorney fees attributable to responding to the Commissioner's motion.

This court has the authority to impose sanctions: "to deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage their own proceedings." *Braley v. Campbell*, 832

F.2d 1504, 1510 (10th Cir. 1987); *see also* Fed. R. App. P. 38 ("If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.") In an appropriate case, Rule 38 permits sanctions against attorneys as well as parties, if an attorney has brought a truly frivolous appeal on behalf of a client. *Braley*, 832 F.2d at 1511. "An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit." *Id.* at 1510 (quotation omitted).

When a court is considering the imposition of sanctions under Rule 38, due process requires that notice and an opportunity to be heard be given to the persons against whom sanctions are requested. *Id.* at 1514. Due process requirements are satisfied if the party seeking sanctions files a separate motion for sanctions and the party against whom sanctions are sought has "the opportunity to file a brief or otherwise be heard." *Id.* at 1515.

An unvarnished recitation of the steps leading to Mr. Smith's appeal demonstrates its frivolousness. He and Ms. Hook were co-petitioners in the dismissed Tax Court cases. Only Ms. Hook timely appealed the dismissals. In Ms. Hook's appeal, this court summarily affirmed the Tax Court's actions. *Hook*, 103 Fed. Appx. at 664. Mr. Smith then asked the Tax Court for leave to vacate or revise its just-affirmed decisions. The Tax Court denied his

motions. Mr. Smith, represented by Ms. Hook, appealed to this court.

For this blatant waste of judicial time and resources, sanctions are appropriate. Because the Commissioner filed a separate motion for sanctions (with documentation of the average expense in attorney salaries and costs incurred in defense of frivolous taxpayer appeals) and Mr. Smith responded in opposition to the motion, due process considerations have been met. We grant the Commissioner's motion and order Mr. Smith and Ms. Hook, jointly and severally, to pay the lump sum of $6,000 to the Commissioner. For obvious reasons, we deny Mr. Smith's counter-motion for attorney fees.

The judgment of the United States Tax Court is AFFIRMED. Mr. Smith's motions for recusal of this court are DENIED. The Commissioner's motion for sanctions is GRANTED; Mr. Smith's motion for sanctions is DENIED.